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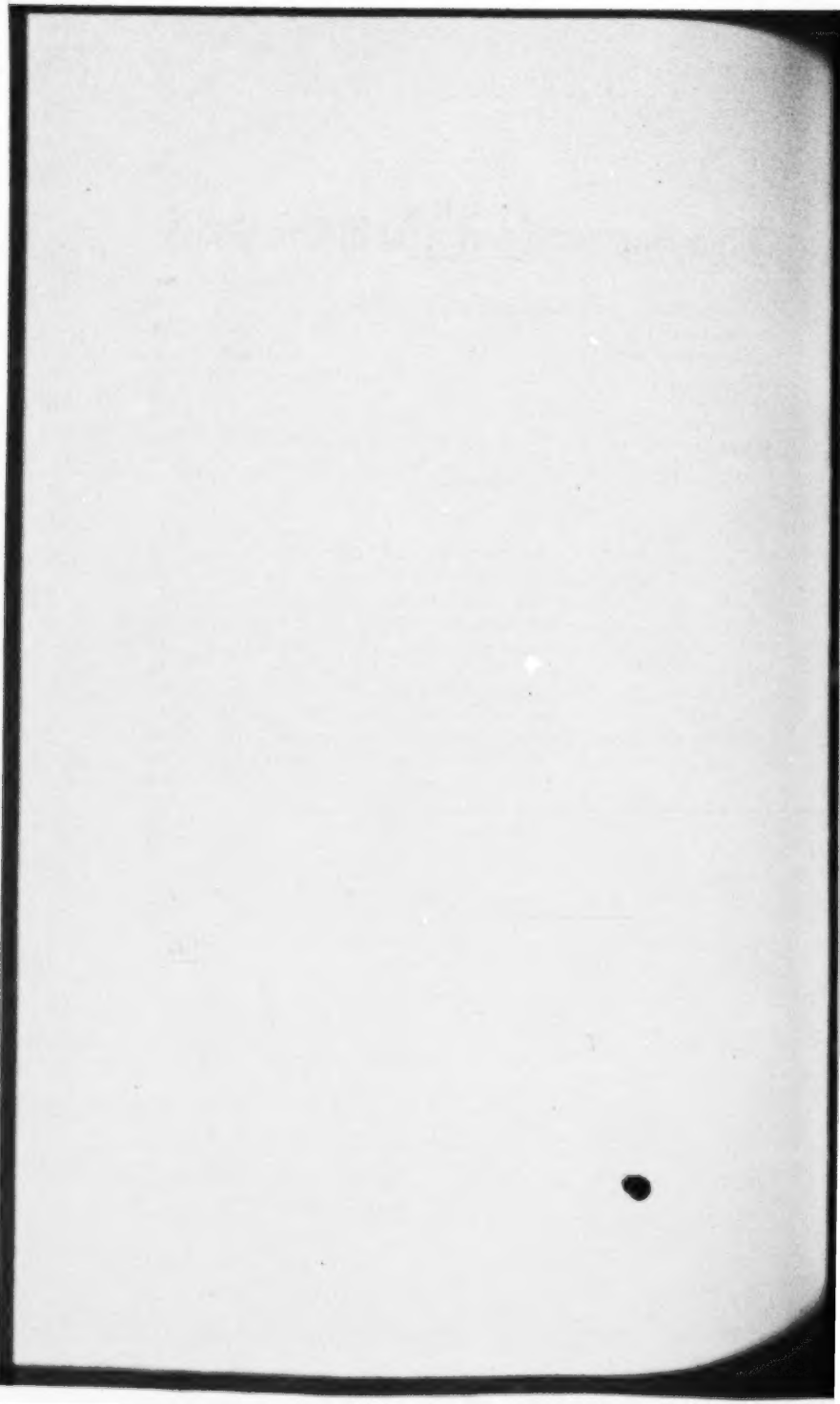

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 148

GUY A. THOMPSON, TRUSTEE, FOR MISSOURI PACIFIC RAILWAY COMPANY, ET AL., PETITIONERS

v.

JOSEPH L. SPEARMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Arkansas (R. 70–77) has not been reported. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 95–107) is reported at 167 F. 2d 626.

JURISDICTION

The judgment of the Unted States Circuit Court of Appeals for the Eighth Circuit was entered April 19, 1948 (R. 105). A petition for rehearing was denied on June 1, 1948 (R. 119). The

petition for a writ of certiorari was filed on July 12, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Under the terms of a collective bargaining agreement, railroad employees in the carmen craft, classified as helpers, were advanced in proper circumstances to serve as mechanics, and, after three years of service in these positions, without any other qualifying requirements, were entitled automatically to permanent classification as mechanics. Respondents had been upgraded from helpers to the position of mechanics but had not completed three years' service at the time of their induction into military service. Other helpers were similarly upgraded after respondents and upon serving three years received permanent classification as mechanics. After being honorably discharged, respondents were restored to the mechanics' positions they occupied at the time of their induction. But for their induction into military service, they would have been entitled automatically to permanent classification as mechanics. Before the expiration of a year after their restoration, under a provision in the collective bargaining agreement which required helpers in mechanics' positions to be reduced before permanently classified mechanics, respondents were demoted to helpers' positions while the helpers

advanced at a later time were retained as mechanics.

The question presented is whether the court below erred in holding that, under the provisions of Section 8 of the Selective Training and Service Act of 1940, respondents were entitled to be retained in mechanics' positions ahead of other helpers subsequently advanced over whom they would have enjoyed greater seniority as mechanics but for their service in the armed forces.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the

duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

STATEMENT

This action was brought by honorably discharged veterans of World War II under Section 8 (e) of the Selective Training and Service Act of 1940, as amended, to require the Trustee of the Missouri Pacific Railway Company to reinstate them to positions from which they were demoted and to recover the difference in pay between the two positions (R. 1–2).[1] System Federation No. 2 of Railway Employees' Department of the American Federation of Labor and its President intervened to oppose the claim (R. 6–10).

The essential facts have been stipulated and are not in dispute (R. 64–68). Respondents were members of the craft of railroad employees known as carmen and were represented for collective bargaining purposes by the System Federation (R. 64). The basic collective bargaining agreement dated July 1, 1936 (R. 11–55), was modified by a memorandum agreement effective July 1, 1942 (R. 56–61). The carmen's craft includes, among others, employees classified as helpers and as mechanics (R. 78). Under the terms of the modified agreement, helpers within the carmen's craft, among others, were entitled to be advanced to serve as mechanics (R. 65). Employees so ad-

[1] Four veterans were named in the original petition (R. 1). The judgment below was favorable to three and adverse to one (R. 106). The three in whose favor judgment was rendered below are the respondents in this proceeding.

vanced were to receive compensation at mechanics' rates; they were not to acquire seniority as mechanics, but would continue to accumulate seniority as helpers (R. 66). However, regular helpers so advanced who "accumulate[d] three years or more service as a mechanic may thereafter continue in the mechanic's classification" with their seniority as mechanics dating from termination of the three years' service as mechanics (R. 66). Although the contract said nothing more in this connection, it was stipulated that "the practice has been to require three years actual service" before permanent classification (R. 68). In another connection, mechanics "furloughed" were considered to be "working" (R. 56).

Respondents were helpers who had advanced to the positions of mechanics under the terms of the modified collective bargaining agreement (R. 65, 69). Before they accumulated three years' service as mechanics, however, they were inducted into the armed forces (R. 65, 69). Respondents ultimately completed military service satisfactorily, were honorably discharged, and were reinstated to the position of mechanics in the status which they had previously held (R. 66). Other helpers were upgraded to mechanics' positions after respondents and, since their service had not been interrupted by induction into the armed forces, were permanently classified as mechanics exactly three years after they were upgraded to mechanics' positions (R. 67).

The memorandum agreement of July 1, 1942, also provided that in any reduction in force helpers serving in mechanics' positions would be reduced before qualified mechanics (R. 58). On March 30, 1946, as the result of a reduction in force, respondents were downgraded from mechanics' positions to their former positions as helpers (R. 67). This downgrading resulted in a reduction in pay of 20 cents per hour (R. 67). At the time respondents were downgraded, other helpers, who had been promoted to mechanics' positions after respondents, were retained in their positions because their classifications had been made permanent by three years' service on the job (R. 67).

If respondents had not been inducted into military service, they would have been eligible for permanent classification as mechanics after three years and, if they had elected to be so classified, would have had more seniority in their positions than other employees retained in mechanics' positions (R. 67, 69). It was stipulated that respondents were as well qualified to perform the duties of mechanics as when they left these positions to enter military service and they were downgraded not because of any failure to perform satisfactorily the duties of mechanics but solely because, by virtue of their absence in the armed forces, they had not been permanently classified as mechanics three years after they originally began service in those positions (R. 68).

The district court held that respondents occupied temporary positions as mechanics in which they could acquire no seniority as mechanics and that they were entitled to reinstatement only to their permanent positions as helpers (R. 74). The promotion to permanent mechanics of other helpers with less seniority than respondents was held attributable not to their seniority as helpers but to the fact that they worked three years as mechanics (R. 75). The circuit court of appeals reversed, holding that the positions which respondents left when they were inducted were not temporary positions within the meaning of the Act (R. 101) and that the collective bargaining agreement contemplated eligibility to the permanent classification of mechanic by the lapse of three years without regard to the employee's proficiency (R. 102–104). The court concluded that, since under the collective bargaining agreement proficiency was not made a test of advancement, the contract could not validly provide that time in the military service could not count as time served for promotion, and that, for the first year of their restoration, respondents were entitled to step back on the seniority escalator "at the precise point they would have occupied had they kept their position continuously during the war" (R. 103–104). This entitled them, the court held, to protection against demotion.

ARGUMENT

Respondents, as restored veterans, are not seeking any status or seniority they would not have enjoyed had their employment not been interrupted by their military service. They seek only the same treatment accorded nonveteran employees who occupied comparable positions at the time of respondents' induction. The status sued for would have been theirs as a matter of contract right except for their absence in the armed forces. In holding, in these circumstances, that respondents could not be demoted while employees with less seniority at the time of their induction were retained as mechanics, and that respondents "do not step back on the seniority escalator at the point they stepped off. They step back on at the precise point they would have occupied had they kept their position continuously during the war" (R. 104), the court below gave effect to the principle enunciated by this Court in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284.[2]

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[2] The strength of this principle would seem reinforced by its repetition in many forms in the *Fishgold* case and in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40.

Fishgold v. *Sullivan Corp.*, *supra:*

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise

The decision carries out the Congressional purpose and applies the rule announced by a number of courts of appeals. *Feore* v. *North Shore Bus Co.*, 161 F. 2d 552 (C. C. A. 2); *Trusteed Funds* v. *Dacey*, 160 F. 2d 413, 419 (C. C. A. 1); *Gauweiler* v. *Electric Stop Nut Corporation*, 162 F. 2d 448, 451–452 (C. C. A. 3); *Hewitt* v. *System Federation No. 152*, 161 F. 2d 545, 546–547 (C. C. A. 7); *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466 (C. C. A. 6).

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point he would have occupied had he kept his position continuously during the war" (pp. 284–285).

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Trailmobile Co. v. *Whirls*, *supra:*

"The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41).

"That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployement without going into the service" (p. 56).

"The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58).

"The restored veteran, it was held, could not be disadvantaged by his service to the nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. 284. He was to be restored and kept, for the year at least, in the same situation as if he had not

We believe that, at this stage of this proceeding, it is appropriate to base any analysis of this case on the assumption that the court below was correct in holding that the sole condition to the status respondents assert was lapse of time. This is true, we think, because the question of whether or not an unqualified right to a mechanic's position was created by the collective bargaining agreement upon the mere passage of time is not one of general importance. Depending as it does on the facts in this case, that issue may properly be put aside and the view of the court below accepted. Such an approach is further warranted by the fact that the record rather clearly supports the conclusion of the court below. It has been stipu-

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gone to war but had remained continuously employed or had been 'on furlough or leave of absence' " (p. 58).

Dissenting opinion in *Trailmobile* case:

"In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away" (p. 62).

"The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services" (p. 63).

"In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement" (p. 63).

[3] S. Rep. No. 2002, 76th Cong., 3d sess., p. 8:

"The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life."

lated that if respondents had not been inducted into the armed service, they would have been entitled, under the terms of the collective bargaining agreement, to retention in the position from which they were demoted. (R. 67, 68.) While the parties also stipulated that "the practice has been to require three years actual service" (R. 68), the only apparent application of that requirement has been to veterans like respondents. In these circumstances there is no merit in petitioners' contention that the principles of *Fishgold* and *Whirls* are inapplicable or that the instant decision is in conflict with decisions of other courts of appeals.

The decisions relied upon by petitioners, even if correctly decided, involved different rights or related to different areas of the employment relationship from those involved here. (1) Petitioners' assertion that respondents' tenure as mechanics was temporary and therefore not within the protection of the Act is without merit. It is not disputed that respondents were permanent employees and it is clear that the position to which the veteran must be restored involves all the incidents of the employment relationship including stepup, stepdown, and layoff, and the right to have these steps taken in accordance with established priorities. *Fishgold* v. *Sullivan Corp., supra.* (2) The decisions dealing with the veteran's right to promotion upon which petitioners rely to support a conflict, unlike the instant case,

involved a variety of contingencies and not an unqualified contractual right to automatic promotion upon the mere passage of time in the job.[4] *Boston & M. R. R.* v. *David*, 167 F. 2d 722 (C. C. A. 1); *Harvey* v. *Braniff International Airways*, 164 F. 2d 521 (C. C. A. 5); *Hewitt* v. *System Federation No. 152*, 161 F. 2d 545 (C. C. A. 7); *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466 (C. C. A. 6); cf. *Lesher* v. *P. R. Mallory & Co.*, 166 F. 2d 983 (C. C. A. 7). (3) Similarly, decisions interpreting different contracts dealing with such aspects of the employment relationship as the veteran's right to vacation pay in a particular year (*Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (C. C. A. 2); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C. C. A. 2)), or the amount of his severance pay (*Seattle Star* v. *Randolph*, 168 F. 2d 274 (C. C. A. 9)), cannot be said to be in conflict with a decision

[4] Petitioners urged that the requirement of three years' service for promotion was intended to insure the proficiency of the employee (R. 102; Pet. 21). The court below rejected the argument, holding that it was not the intention of the contracting parties to have the right to advance to the permanent classification of mechanic depend upon proficiency (R. 103. Proficiency may have been a consideration when respondents were originally upgraded, since the contract provided that the assignment to mechanic's work was to be made "with due regard to their order of seniority, qualifications for advancement, etc." (R. 57). Respondents, however, had passed this hurdle before their induction and it was stipulated that they were as qualified to serve as mechanics when they were reinstated as when they first entered the position and that their demotion had no relation to their proficiency (R. 68).

recognizing a right to promotion based on seniority or time in job. Cf. *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F. 2d 46 (C. C. A. 3); *Mentzel* v. *Diamond*, 167 F. 2d 299 (C. C. A. 3). Whether or not a collective bargaining contract may validly provide that time in military service, like time on leave of absence or furlough, shall not be counted in computing vacation or severance pay, military service cannot be excluded in determining seniority. Whatever the rights to "other benefits" may be, Section 8 (c) contains the unequivocal mandate that the veteran shall be restored "without loss of seniority."

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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